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Sitting and Standing in the Supreme Court: Warth Standing and the Problem of Distributive Justice

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SITTING AND STANDING IN THE SUPREME COURT: *WARTH* STANDING AND THE PROBLEM OF DISTRIBUTIVE JUSTICE

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Almost a decade ago in *Warth v. Seldin,*[1] the Supreme Court set forth a definitive statement on the law of standing. At the close of *Warth*'s first decade, however, what is and should be required for standing to sue in the federal courts remains a topic for debate. As recently as the 1982 term, the Court found itself rejecting the role of a national tutor of would-be litigants on the meaning of standing.[2] The only matter on which all observers fully agree is that would-be litigants must conform with the article III[3] principle that only those parties with standing to sue may litigate.[4] The problem of applying this acknowledged standard, however, remains: Who, if any, among those perceiving themselves as injured, is entitled to stand at bar to litigate for a redress of injuries? Complicating the search for a coherent standing

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1. 422 U.S. 490 (1975).

2. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 476 n.13 (1982). More recently, in Allen v. Wright, 104 S. Ct. 3315, 3325 (1984) (Justice O'Connor writing for the majority), the Court cautioned that "the constitutional component of [sic] standing doctrine incorporates concepts concededly not susceptible of precise definition." The Court urged that such terms as "distinct and palpable," "abstract," "conjectural," "hypothetical," "fairly [traceable]," and "likely"—all key terms in the standing lexicon—are terms that "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise." Yet, the Court offered the reassurance that it is hardly "at sea in applying the law of standing." "In many cases," said the Court, "the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." The fact that article III standing is built on the single basic idea of separation of powers, "makes possible the gradual clarification of the law through judicial application." *Id.*

3. Article III provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all Cases of admiralty and maritime Jurisdiction;—to controversies to which the United States shall be a Party;—to controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States; between citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

4. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 476 n.13 (1982).

doctrine is the need to find a rule which is just and free of judicial bias.[5] For if it is true that "where you stand depends on where you sit,"[6] the implications for the Supreme Court's ability to form a just rule of standing are not entirely encouraging.

Although the Court has struggled for five decades[7] to frame a fair and easily understood standing doctrine, cases before it in recent years reflect the failure of that effort.[8] The problem is not solely that internal disagreement persists among the justices over the proper articulation of the standard or that the dialogue is increasingly acrimonious. General principles stated by the Court have proven less controlling than expected in new situations. If the harshest of the justices' own critiques is accepted, the Court has developed a scheme for standing that masks basic philosophical disagreement about who should be allowed to sue. On one side of this debate sit those accused of too casually involving the courts in philosophical disputes.[9] On the other are those accused of recasting the historic role of the courts as arbiter of legal disputes.[10] While both sides desire a standard for standing that responds

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5. For a discussion of the equities considered by the courts, see *infra* text accompanying notes 152-53.

6. This aphorism has been attributed to Donald K. Price by G. ALLISON, ESSENCE OF DECISION 176 n.71 (1971).

7. *See infra* discussion beginning at text accompanying note 23. As the Court noted in Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 151 (1970): "Generalizations about standing are largely worthless as such." More recently, in Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), the Court acknowledged its vacillation on the subject by stating "that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it. . . ." *Id.* at 475.

8. Even those expressing some sympathy for the Court's recent direction have suggested that its present approach lacks coherence. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 70 (4th ed. 1983); *see also* Nichols, Jr., *Rethinking Standing,* 72 CALIF. L. REV. 68, 73 (1984) (Court occasionally skips over standing issues entirely in order to proceed directly to the merits of attractive cases); Nichols, Jr., *Standing on the Constitution: The Supreme Court and* Valley Forge, 61 N.C.L. REV. 798, 799 (1984) (Professor Nichols states: "[r]epeatedly, actions in which no cognizable injury distinct from violation of the Constitution has been alleged have been presented to the Supreme Court. Some of these cases eventually have been determined on the merits, while others have been dismissed for lack of standing."). A student commentator also noted the need for a framework within which to view standing problems:

> The doctrinal tests which have been developed have not provided that framework. Without such a framework, a series of rules develop to deal with standing in different substantive contexts. For instance, there will be a set of rules for dealing with standing in abortion cases, with standing in environmental cases, *etc.* The result is that standing reflects a personal hierarchy of values rather than principled decision making.

Comment, *Standing to Challenge Administrative Action: A Balancing Approach,* 25 UCLA L. REV. 1358, 1402-03 n.242 (1978).

9. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974). Those seeking to limit the role of the federal courts in arguably generalized disputes have charged that minimalists risk a distortion of the role of the judiciary in its relationship to the executive and legislative branches. *Id.*

10. *See* Simon v. East Ky. Welfare Rights Org., 426 U.S. 26, 66 (1976) (Brennan, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 530 (1961) (Harlan, J., dissenting)). Those

to the constitutional mandate that the judiciary determine only cases and controversies, agreement about the details has proven elusive.

In place of an overarching doctrine, a factionalized Court has emerged, divided by disagreement over a significant subset of cases involving "non-Hohfeldian plaintiffs."[11] At issue is whether such plaintiffs merely act as private attorney generals, bringing suits to vindicate the rights of third parties who are not before the Court. One faction of the divided Court espouses a "prudentialist"[12] concept of standing and the other adheres to a "minimalist"[13] view. The prudentialists view injuries shared by all citizens as a result of failures to act in conformity with the Constitution as too abstract to be judicially cognizable. The minimalists argue that even those citizens who have incurred injuries that are generally shared should have a judicial right to protect their interests.

Nevertheless, both factions share the basic tenet that standing at the federal level is a blend of constitutional and prudential concerns. Therefore, one who claims standing in a federal court must do so on the basis of either a constitutional[14] or a statutory[15] grant. There are two other basic re-

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seeking to minimize judicial impediments to the right to sue in the federal courts have charged that those insisting on close scrutiny of the would-be litigant's alleged injury treat the article III requirement "without any 'particularization' in light of either the policies properly implicated or . . . relevant precedents . . . " and by such a manipulation stretch that conception in a way that "threatens that it shall 'become a catchall for an unarticulated discretion on the part of this Court' to insist that the federal courts 'decline to adjudicate' claims that it prefers they not hear." *Id.* (Brennan, J., concurring).

11. Non-Hohfeldian plaintiffs are said to act essentially as private attorney generals bringing suits to vindicate the rights of third parties who are not before the court. They are "Non-Hohfeldian plaintiffs" pursuing "public actions" in the sense that they lack the personal right to enforce a particular duty that was ascribed to the traditional plaintiff in Professor Louis Jaffe's adaptation of Wesley Newcomb Hohfeld's property scheme. *See* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 YALE L.J. 16 (1913); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Idealogical Plaintiff,* 116 U. PA. L. REV. 1033 (1968).

An Hohfeldian plaintiff, on the other hand, is said to be one who seeks a determination that he or she has a right, a privilege, an immunity, or a power. In terms of standing to litigate, however, the courts have generally been in disagreement as to how they should handle suits brought by non-Hohfeldian plaintiffs, and whether an Hohfeldian plaintiff should be a prerequisite to instituting a case. *See* Jaffe, *supra,* at 1033-34.

Professor Jaffe asserts that an Hohfeldian plaintiff should not be considered a necessary requirement for bringing an action. The true inquiry, according to Jaffe, is whether the plaintiff is a person whose legal position will be affected by the court's judgment. *Id.* In this context, there appears to be little difference between a non-Hohfeldian plaintiff and an Hohfeldian plaintiff because to allow any citizen to bring an action to enforce a law in which he or she is interested is basically the equivalent of recognizing that all plaintiffs have a "right" to have the law enforced.

12. *See infra* notes 38-40 and accompanying text.

13. *See infra* notes 41-46 and accompanying text.

14. *See, e.g.,* Flast v. Cohen, 392 U.S. 83 (1968) (granting standing because taxpayer petitioners alleged violation of a specific constitutional provision—the establishment clause of the first amendment).

15. *See, e.g.,* United Public Works v. Mitchell, 330 U.S. 75 (1946) (rejecting standing of

quirements that must be fulfilled: the plaintiff must suffer an injury-in-fact and the injury must be fairly traceable to the prohibited conduct of the defendant.[16]

Disagreement, therefore, focuses on the application of prudential concerns to constitutionally based claims. Minimalists disagree with the prevailing rule that even if a plaintiff can meet the requirement for a claim grounded on the Constitution, the suit may still be barred if the injury is a so-called generalized injury—the kind of injury suffered by the population as a whole.[17] Thus, only when statutory terms for standing are invoked will both wings

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executive branch employees barred from participating in political activities because petitioners had not yet violated the Hatch Act barring such activities).

16. *See, e.g.*, Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 150 (1970) (noting that initial inquiry is whether the plaintiff alleges that the challenged action caused economic or other injury-in-fact). A recent illustration of the Court's approach to the standing problem is found in Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). In *Duke,* an environmental organization, a labor union, and individuals living near a nuclear power plant brought suit against Duke Power Co. and the Nuclear Regulatory Commission. The plaintiffs challenged the constitutionality of the Price-Anderson Act, 42 U.S.C. § 2210 (Supp. V 1970), which imposed a $560 million limitation on liability for nuclear accidents resulting from the operation of federally licensed private nuclear plants. The Act also required those indemnified by the fund to waive all legal defenses in the event of a substantial nuclear accident and provided that in the event of a nuclear accident involving damages in excess of the amount of the aggregate liability, Congress would take whatever action it deemed necessary to protect the public from the consequences of such a disaster. 438 U.S. at 65-67.

Chief Justice Burger, in addressing the issue of standing, reiterated the familiar position that the essence of the standing inquiry is whether the parties seeking to invoke the Court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* at 72 (*quoting* Baker v. Carr, 369 U.S. 186, 204 (1962)). The Court then articulated a two-pronged test for determining when this personal stake is present. The plaintiff must allege both a "distinct and palpable injury," and a "fairly traceable" causal connection between the alleged injury and the challenged conduct. *Id.* at 72.

So viewed, the Court found that the plaintiffs had standing to challenge the Act's constitutionality. *Id.* at 81. According to the Court, the potential for immediate adverse effects from construction of the nuclear plants was sufficient to satisfy the injury-in-fact requirement. In addition, the Court recognized a causal relationship between the Act and the construction of the nuclear plants. A substantial likelihood existed that "but for" the liability limitations in the Price-Anderson Act, Duke Power Co. would not have proceeded to build the nuclear plant. *Id.* at 79-80. Therefore, the Court was able to reach the merits of the petitioner's case, but nevertheless reject the petitioner's claim by finding the Act constitutional. *Id.* at 94.

17. While recognizing some possible difficulties in categorizing the Court's prior opinions, Justice Harlan, the lone dissenter in Flast v. Cohen, 392 U.S. 83 (1968), saw the underlying prudential issue before the Court as whether non-Hohfeldian plaintiffs should be allowed to sue. *Id.* at 120 (Harlan, J., dissenting). He thought it "clear that non-Hohfeldian plaintiffs as such, are not constitutionally excluded from the federal courts." *Id.* (Harlan, J., dissenting) Thus, the problem was a moral and ethical one, that of determining in what circumstances such suits ought to be permitted. That question was unavoidable because of the near impossibility of measuring any differences in the intensity of the interests of those seeking to vindicate highly generalized injuries of traditional plaintiffs. *Id.* at 124 (Harlan, J., dissenting).

of the Court put aside disagreements over the applicability of prudential concerns and proceed to decide the case. The Court's willingness to ignore prudential concerns for statutorily based claims reflects the Court's deference to the congressional will. In these instances, the Court's prudential concerns are overcome because Congress may extend jurisdiction based upon the minimum requirements of article III[18]—an injury-in-fact and a causal connection between the defendant's conduct and the plaintiff's injury.[19]

Examining the foregoing debate, this article argues that the now-dominant prudential approach to standing is incapable of resolving the standing dilemma and offers no real opportunity for the emergence of a workable doctrine. In addition, the Court's current formulation fails to provide a rational basis so as to intelligibly inform future litigants of the grounds which are necessary to have standing. Consequently, an urgent need exists for a standing doctrine that allows plaintiffs to vindicate the political objectives of our lawmakers. Rather than pursue that search, however, prudentialism has sought to insulate the courts from the undertaking. It seeks to channel every generalized grievance into the legislative arena and thereby to limit disfavored claimants to the political process. The Court has failed to appreciate that generalized claimants, having found their way to the courts through the political process, seek vindication of rights which are supposedly already secured by our laws. Offered, therefore, is a scheme both for examining the evolution of the Court's prior decisions and for highlighting the major standing concern ignored by the Court—the vindication of generalized injuries resulting from unconstitutional government conduct.

By examining the evolution of the Court's standing doctrine and the implications of its analysis, this article will discuss the meaning and morality of standing—a discussion too long deferred by the Court. The intent is twofold: first, to provide a straight-forward framework for discussing the present status of the doctrine of standing, and second, to move from that framework to an explanation of why the Court's approach is incomplete. It is suggested that the Court's vision, though blurred, is not intentionally shortsighted. The standing cases merely reveal an evolving intra-Court philosophical debate about how best to avoid immersing the Court in political disputes. Ironically, however, the Court has failed to avoid these disputes and, at the same time, has imposed unacceptable costs on injured parties, the legal system, and society. Not the least of the costs is that the Court's "new orientation"[20] has produced increasing dissonance in the federal courts while at the same time falling short of its primary objectives of assuring

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18. U.S. CONST. art. III, § 2.

19. For an argument that the Supreme Court in the early 1970's unconsciously transformed the law of standing from a constitutional to a statutory question, see Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 665 (1977).

20. One scholar recognized 1968 as the year when the Supreme Court began its "new basic orientation" regarding standing. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 419 (3d ed. 1972); *see also infra* note 31.

both an adequate presentation of cases and judicial sensitivity to the shared-role concept of a tripartite form of government.[21]

Ultimately, the constitutional standing doctrine must be articulated in a way that sympathetically differentiates between injuries that are related solely to a litigant's generalized condition in society, and injuries which, though shared generally in some respects, strike invidiously at particular litigants.[22] Such an articulation, however, is a large undertaking, one which is beyond the limited scope of this article. Indeed, the current discussion is only intended to establish that theoretical alternatives to the Court's disposition already exist, at least with respect to those generalized plaintiffs who assert the right to vindicate their status as equal members of our society. Moreover, grounds for distinguishing some generalized plaintiffs raise the necessary implication that grounds for distinguishing other plaintiffs within this class may also exist. The hope is that an understanding of the debate will lead to a recognition of a standing doctrine that reflects the imperative that justice cannot exist for our society unless it is grounded upon the right of each member of the society to have it affirmed.

In part A, subsection one reviews the underlying causes for the failure of a standing doctrine to emerge. Subsection two gives particular attention to the Court's attempt to develop a cogent rationale for imposing requirements for standing that go beyond the minimum requirements of article III. Subsection three examines the Court's efforts to establish a doctrinal framework, discusses the implications of these efforts, and explains why the sufficient injury requirement in the constitutional context poses problems for the Court that have proven difficult to resolve. Finally, part B ad-

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21. For a discussion of the "adequate presentation" objective, see Barlow v. Collins, 397 U.S. 159, 172 (1970); Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 154 (1970); Flast v. Cohen, 392 U.S. 83, 106 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962). Professor Davis, commenting on the Court's idea that standing can be used to assure competent presentations by the litigants, was short and to the point: "The idea deserves a quiet burial." K. DAVIS, *supra* note 20, at 427.

For a discussion of the judicial sensitivity to the tripartite system, see Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221-22 (noting that standing requires a concrete, not abstract injury). The *Schlesinger* Court found that the courts are able to utilize the parties' authoritative presentations of the facts and claims only in the context of a case involving a concrete injury. That is, by awaiting a concrete injury, a court is presumably assured that adjudication will not take place unnecessarily. This requirement is especially pertinent in regard to "the most important and delicate of its responsibilities," that of constitutional interpretation. *Id.* at 221. Furthermore, the Court found that the rule of caution implicitly imposed by the "concrete injury" requirement promotes two underlying considerations. First, the requirement assures that a need exists for the court to exercise the power of judicial review. Second, the discrete factual context of the injury imposes limits by marking the scope beyond which judicial relief is not required. In turn, cognizance of this need for limitation is necessary to diminish the likelihood of confrontation with the other branches of government. This also avoids abuse of the judicial process, distortion of the judiciary's role in a tripartite political system, and charges that the judiciary is engaging in government by injunction. *Id.* at 221-22; *see* K. DAVIS, *supra* note 20, at 427.

22. *See infra* text accompanying notes 128-51.

dresses considerations relevant to directing the standing debate toward an approach that provides all injured parties with a judicial right to protect their interests.

A. The Search for a Standing Doctrine

1. Prudentialism and Minimalism

In recent years, the Supreme Court invariably has invoked the principle first enunciated in *Baker v. Carr,*[23] that the plaintiff must allege a "personal stake in the outcome of the controversy so as to assure the adverseness upon which the Court depends for illumination of difficult constitutional questions."[24] Although the idea saw its flowering in *Warth v. Seldin,*[25] its roots are planted firmly in an earlier case, *Frothingham v. Mellon.*[26] The decision to deny Mrs. Frothingham, a taxpayer citizen, standing to challenge certain government tax expenditures commenced a debate within the Court which in its essential terms continues to the present.[27] The *Frothingham* Court failed to make clear whether the plaintiff was denied standing solely because her injury as a taxpayer was shared by too many citizens to constitute an article III case or controversy, or because her lack of uniqueness dictated that, in prudence, courts should not attempt to adjudicate these disputes.[28]

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23. 369 U.S. 186 (1962).

24. *Id.* at 204. *But see supra* note 21 (suggesting other standing objectives).

25. 422 U.S. 490 (1975).

26. 262 U.S. 447 (1922). The lead caption for the combined case was Commonwealth of Mass. v. Mellon, Secretary of the Treasury.

27. In four of the five recent major standing decisions the Court has divided significantly. *Compare* Allen v. Wright, 104 S. Ct. 3315 (1984) (rejecting standing of black parents to require stronger IRS enforcement of rules governing tax exempt status for alleged segregated academies); City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983) (rejecting standing of a black who had been the victim of alleged police abuse as a result of the unwarranted application of a chokehold during a nonviolent arrest); Valley Forge Christian College v. American United for Separation of Church & State, 454 U.S. 464 (1982) (rejecting standing of respondents challenging an HEW action; holding that in order to have standing, respondents must challenge a congressional enactment under art. I, § 8, not an executive branch action arguably authorized by the Act) *with* United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1979) (holding that a named plaintiff bringing a class action suit has standing to appeal the denial of class certification even when the named plaintiff's substantive claim is moot); Gladstone v. Village of Bellwood, 441 U.S. 91 (1979) (granting standing to individuals who acted merely as "testers" in HUD scheme to uncover real estate agents who were "steering" potential white and black homeowners to separate "target" areas in violation of § 812 of the Fair Housing Act of 1968).

28. Subsequently, in Flast v. Cohen, 392 U.S. 83 (1968), the Court reflected on the *Frothingham* requirement that taxpayers show a logical nexus between their status and the claim they seek to adjudicate. *Id.* at 105. Although the Court recognized that Mrs. Frothingham established the first nexus by attacking a spending program, the Court found that she had failed to establish the second. Her constitutional attack was not based upon an allegation that Congress, in enacting the Maternity Infancy Hygiene Act of 1921, ch. 135, 42 Stat. 224 (repealed 1927), had breached a specific limitation upon its taxing and spending power. Instead, by alleging that Congress had surpassed the limitations set forth in the tenth amendment, Mrs. Frothingham was implicitly raising not her own rights as a taxpayer to be free from Congressional exercise of authority in excess of the Constitution, but the interests of the states in not

Nevertheless, *Frothingham* established a clear line prohibiting taxpayers from litigating their dissatisfaction with governmental tax expenditures.[29] But that line marked something more. On one side of it sat the prudentialists, who perceived a general need for courts to forestall an incalculable number of future suits pitting the government against an enormous population of undifferentiated taxpayers who might disagree with an expenditure decision. On the other side sat the minimalists, whose primary concern was not the capacity of courts to adjudicate taxpayer challenges, but the undesirability of defining courts as arbiters of only judicially designated kinds of constitutional suits.

Forty years later in *Flast v. Cohen,*[30] the Court re-examined the *Frothingham* doctrine.[31] The *Flast* Court noted the Court's previous failure to ground its "impenetrable barrier" against taxpayer lawsuits on either constitutional or prudential considerations.[32] Rather than test the limits of the doctrine or state its rationale, however, the Court found room for an accommodation of minimalists' views by reformulating the applicable test. The re-examination revealed no absolute constitutional bar against taxpayer challenges to the federal government's taxing and spending powers.[33] According to the Court, the key requirement for standing was that a logical nexus

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having Congress invade their legislative province as reserved by the Constitution. 392 U.S. at 105. This claim necessarily failed to pit her interest against that of the federal government. *Id.* at 106.

29. 262 U.S. at 487.

30. 392 U.S. 83 (1968).

31. Professor Wright attributes the necessity for the new appraisal, in part, to the political pressures of the 1960's when both opponents and proponents of federal aid to religious institutions pressed Congress and the courts for a determination of the limits imposed by the first amendment. *See* C. WRIGHT, *supra* note 8, at 62.

32. 392 U.S. at 85. Though the Court did not make clear the precise nature of the statutory wrong in *Frothingham,* Justice Harlan in his dissenting opinion viewed the majority's opinion as "not merely one of *ultra vires,*" but as asserting "an abridgement of individual religious liberty" and governmental infringement of individual rights protected by the Constitution. *Id.* at 125 (Harlan, J., dissenting). On the other hand, the government in *Flast* pressed the view that the *Frothingham* Court had announced a constitutional rule—a rule compelled by article III limitations on federal court jurisdiction and grounded in the doctrine of separation of powers. *Id.* at 92, 93. This view was said to be warranted by the Court's concluding statement in *Frothingham* that to take jurisdiction of the taxpayer's suit, "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another coequal department, an authority which plainly we do not possess." *Id.* at 93 (citing Frothingham v. Mellon, 262 U.S. 447, 489 (1922)). But according to the Court in *Flast,* there was also support in *Frothingham* to suggest that the holding was actually a pronouncement of a rule of restraint. That is, the *Frothingham* Court's contrast of the "comparatively minute and indeterminable" interest of the federal taxpayer as compared to that of the municipal taxpayer, the policy considerations behind the prohibition seemed paramount. 262 U.S. at 487. As the *Flast* Court noted: "This suggests that the petitioner in *Frothingham* was denied standing not because she was a taxpayer but because her tax bill was not large enough. 392 U.S. at 93. In addition, the *Flast* Court spoke of the 'attendent inconveniences' of entertaining the taxpayer's suit because 'it might open the door of federal courts to countless such suits. . . . '" *Id.*

33. 392 U.S. at 101.

exist between the status asserted by the plaintiff and the claim to be adjudicated.[34] Thus, the Court held that the plaintiff taxpayers had standing to sue since they alleged that the federal officials' disbursement of funds was in violation of the first amendment.

In addition to the influence of the *Frothingham* and *Flast* requirements for standing in disputes involving generalized injuries, the influence of Congress has helped to shape the prudentialist-minimalist debate.[35] Both prudentialists and minimalists agree that the critical factor is that the Court's prudential concerns can be overridden by legislation that authorizes lawsuits by

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34. *Id.* (citing Baker v. Carr, 369 U.S. 186, 204 (1962) and Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937)).

35. Justice Douglas, a minimalist, authored the Court's opinion in the companion cases of Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970), the two cases that Professor Davis credits with most drastically changing the law of standing. *See* K. DAVIS *supra* note 20, at 422-23. In *Data Processing,* the Court recognized the standing of a group of retailers of data processing services who sought to overturn a ruling by the Comptroller of the Currency that permitted national banks to make data processing services available to other banks and bank customers. Douglas reasoned that the court of appeals had gone awry by applying prior decisions of the Court such as Tennessee Elec. Power Co. v. T.V.A., 306 U.S. 118 (1939), where competitors were denied standing to enjoin the T.V.A. because the Court could only discern a protected status where, "the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." 397 U.S. at 153 (*citing* Tennessee Elec. Power Co. v. T.V.A., 306 U.S. 118, 137-38 (1939)). Instead, standing was said to exist if "the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise," and if "the interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. Thus, underscoring its move away from standing based on common law conceptions of causes of action, the Court suggested by its action (1) that it would be liberal in construing who was "aggrieved by agency action within the meaning of a relevant statute" under § 702 of the Administrative Procedure Act and (2) that for those aggrieved, the presumption would be that Congress intended that the agency's conduct be reviewable. *Id.* at 157.

Barlow, on the other hand, involved a suit for declaratory and injunctive relief by tenant farmers eligible for payments under the Upland Cotton Program of the Food and Agricultural Act. 397 U.S. at 159. The farmers challenged the validity of a regulation which, by reinterpreting a statutory provision limiting the tenant-recipients' rights to make assignments under § 8(g) of the Soil Conservation and Domestic Allocation Act, exposed them to demands from their landlords that payment under the Act be assigned as a condition of continued leasing. Applying the *Data Processing* injury/zone nexus test, the Court found standing based upon Congress' implicit intent that the Secretary of Agriculture protect the interests of tenant farmers. *Id.* at 164.

While recognizing the utility of the statutory grant analysis, however, prudentialists were not without concern. In Justice White's view, faint description of the "interest to be protected" had, *sub rosa,* become sufficient because the Court had failed to declare that harm "insubstantial in fact" could not constitute "injury-in-fact." United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 723 (1973) (White, J., dissenting in part). Foreseeing a disastrous result from such an analysis, he insisted that the sufficiency of the alleged injury, must be tested by the Court's assessment of its "remoteness" and "speculativeness." *Id.* (White, J., dissenting in part). For a further discussion of *SCRAP,* see *infra* text accompanying notes 52-59.

those suffering even highly generalized injuries.[36] These injuries are usually held by the Court to be insufficient to confer standing[37] because they fail to assure that the injured party will be a litigant with a keen personal interest in the dispute. The Court[38] fears becoming engaged in settling philosophical disputes rather than adjudicating actual controversies that pit real interests advocated by disputants who have something substantial to gain from the decision. The Court also fears over-taxing its resources by resolving disputes that could be better settled by the other branches of government, in particular the Congress. The prudentialists who stress these jurisprudential concerns see an overriding need for a four-fold emphasis on the following considerations: 1) promoting the maximum degree of factual and issue certainty in cases before the bench; 2) emphasizing the cooperative responsibilities of the judicial, legislative, and executive branches in governing the nation; 3) underlining the extraordinariness of the circumstances in which courts are prepared to interfere with legislatively-authorized initiatives; and 4) granting standing only when the Court believes that judicial relief is most

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36. *See Warth,* 422 U.S. at 514; Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) (citing Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring)); Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972); Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127, 137-39 (1947); *see also* United States v. Richardson, 418 U.S. 166, 176 n.9 (1974) (explaining that the *Data Processing* Court granted standing based on lack of Congressional intent to preclude review).

37. While the Court has purported to reject distinctions based on generalized injuries, *Flast,* 392 U.S. at 94-97, it still appears that remnants of that test are alive today. *See* O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (civil rights class action dismissed for failure to allege specific rather than abstract injury). *Compare* Frothingham v. Mellon, 262 U.S. 447, 487-89 (1923) (mere showing of indefinite harm to general populace not enough to establish standing) *with* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974) (injury shared by all citizens as a result of failure by the executive branch to act in conformity with the Constitution is an abstract injury which, standing alone, is not judicially cognizable).

38. Discussion of "the Court's" position is used advisedly, since the reference is technically to the dominant prudentialist position towards plaintiffs with generalized interest. Even recognizing that individual considerations may affect justices in a particular case, the Burger Court's prudentialist majority generally has consisted of Chief Justice Burger and Justices Rehnquist, Powell, and Blackmun. The minimalist minority included Justices Brennan, Marshall, and Douglas. Justices Stewart and White have varied their positions, though after 1974, Stewart can best be described as a prudentialist, as evidenced by his position in the two-man minority in Gladstone v. Village of Bellwood, 441 U.S. 91, 116 (1979) (Rehnquist, J., dissenting) (arguing against standing for community residents where black homeowners were "steered" toward "target" integrated area by real estate brokers). Justice White has, for the most part, avoided the kind of two-person dissents that magnify a Justice's position through his or her relatively isolated exposure. He did, however, dissent in part along with Justice Brennan in Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970) (White, J., dissenting). For further discussion of this case, see *supra* note 35. Yet, Justice White returned to the prudentialist approach in Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), rather than side with the minimalist camp as in United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1979) and Gladstone v. Village of Bellwood, 441 U.S. 91 (1979). Finally, on the basis of Allen v. Wright, 104 S. Ct. 3315 (1984), *see* discussion *supra* note 2, it is likely that Justice O'Connor will firmly align herself with the prudentialist faction.

capable of remedying an alleged wrong.[39] Not only must the plaintiff have suffered an injury that is causally related to the defendant's conduct, but the injury must be such that, in view of these considerations, prudence dictates that courts not abstain from deciding the dispute.[40]

From the minimalists' perspective, however, the Court's jurisprudential bars to non-statutory access are newly imposed.[41] The minimalists characterize prudentialism as a "form of fact pleading long abjured in the federal courts" representing "a selectively imposed pleading requirement which is at odds with the Court's usual view."[42] While subscribing to prudentialism's basic aims, minimalists view concerns over the requisite facts, issues, political comity, institutional prestige, and directness of remedy as secondary to the constitutional mandate to decide cases and controversies.[43] From the minimalists' standpoint, if there arguably exists a constitutional deprivation that is the cause of the plaintiff's injury, then there exists an article III case or controversy because our governmental design requires the courts to resolve such disputes.[44]

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39. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221-22 (1974).

40. *See id.*

41. One commentator has summarized the case and controversy development from the seminal case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) as follows:

> In Marbury, Marshall contended that the judiciary's obligation to decide a case within its jurisdiction necessarily carried with it the power to construe and enforce the Constitution even as against coordinate departments of government. The corollary of that doctrine assumed great significance. The judicial power to construe and enforce the Constitution over any other nonconformable law was a necessary by-product of the judicial role of deciding cases and controversies. In Marshall's view the Supreme Court was not enpowered to act as a Council of Revision—such a power over legislation was specifically rejected by the framers of the Constitution—unless of course the concept of a Council of Revision was understood within the amorphous phrase "case and controversy." But the words "case and controversy" derived content from the historical setting at the time of their conception, the ratification of the Constitution. They did not embrace the English practice of lending the judiciaries' services to other departments. Nor did they give the Supreme Court the license to search the statute books and abstractly pass upon the constitutionality of legislation.

Berch, *Unchain the Courts—An Essay on the Role of the Federal Courts in the Vindication of Social Rights,* 1976 ARIZ. ST. L.J. 437, 442.

42. Simon v. East Ky. Welfare Rights Org., 426 U.S. 26, 55 n.6 (1975) (Brennan, J., concurring) (quoting *Warth*, 422 U.S. at 528-29). In *Warth*, Brennan described the standing bar confronted by a coalition of plaintiffs seeking low-income housing in the suburbs of Rochester, New York, as representing an unacceptable departure by the Court:

> This Court has not required such unachievable specificity in standing cases in the past . . . and the fact that it does so now only can be explained by an indefensible determination by the Court to close the doors of the federal courts to claims of this kind. Understandably, today's decision will be read as revealing hostility to breaking down even unconstitutional zoning barriers that frustrate the deep human yearning of low-income and minority groups for decent housing they can afford in decent surroundings. . . .

422 U.S. at 528 (citations omitted).

43. *See Warth,* 422 U.S. at 518-19 (Douglas, J., dissenting).

44. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 56 (1975) (Brennan, J.,

Thus, for minimalists, as well as prudentialists, the standing issue presents itself as an examination of the claimant's personal stake. In contrast to the prudentialist analysis, however, wherein causally related injury-in-fact merely begins the case or controversy inquiry, a causally related injury under a minimalist analysis resolves the case or controversy concern by providing the requisite personal stake.[45] Therefore, for minimalists the issue of standing turns upon the Court's exercise of reasonable discretion, rather than upon the ability of a plaintiff to surmount prudential concerns. In effect, prudentialists look to Congress for statutory resolution of generalized injuries, while minimalists view such determinations as the Court's inherent duty.[46] At the

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concurring). Drawing upon this *Warth* antecedent, Justice Marshall vigorously dissented from the Court's denial of standing in City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1671-84 (1983) (Marshall, J., dissenting). The Court held that Lyons, a black male resident of the City of Los Angeles, lacked the personal stake required by the fourteenth amendment to enjoin the City's police department from the practice of using life threatening chokeholds while arresting citizens who posed no threat of violence. *Id.* at 1665 (Marshall, J., dissenting). This requisite personal stake was missing despite Lyon's allegation that without provocation he had recently been choked into unconsciousness during the routine issuance of a traffic citation. Justice Marshall's attempt to buttress Lyon's claim was also to no avail. He pointed out that black males constituted 9% of Los Angeles' population, but 75% of the deaths that resulted from the use of chokeholds. Unconvinced by the majority, Justice Marshall characterized the Court as holding,

> that a federal court is without power to enjoin the enforcement of the City's policy, no matter how flagrantly unconstitutional it may be. Since no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy. The City is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result.

Id. at 1671 (Marshall, J., dissenting).

45. Justice Brennan has stressed the more limited minimalist view of the case or controversy requirement as a constitutional policy merely to ensure that the party seeking relief, "has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the [C]ourt so largely depends for illumination of difficult . . . questions.'" Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 52-53 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). In *Warth,* Justice Douglas further emphasized that, without judicial consideration, the widely held expectations of the citizenry would be disappointed, since "the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed." 422 U.S. at 519 (Douglas, J., dissenting). Professor Jaffe alluded to this tension-filled characteristic of the American democratic tradition, observing that:

> Americans began their history with a very intimate version of democratic local government. They have enshrined it in their tradition, and so have resisted control from above. The concept of local democracy could equally exclude judicial intervention precipitated by a citizen who has failed to convince his fellow citizens. But there has existed, side by side with—indeed almost as an aspect of—local democracy, the somewhat countervailing concept that the charter of a local body is a legally enforceable compact among the citizens, a concept to which judicial enforcement of the Constitution has given popular currency.

Jaffe, *Standing to Secure Judicial Review: Public Actions,* 74 HARV. L. REV. 1265, 1282 (1961) [hereinafter cited as Jaffe, *Standing to Secure Judicial Review*].

46. Minimalists, however, would not preclude the Court from applying other article III restraints such as mootness, ripeness, political question, and frivolousness. *See* K. DAVIS, *supra*

core, minimalists view the claims of the plaintiffs who assert generalized injuries as testing the Court's duty to protect interests created elsewhere—by the plenary constitutional process, commonly held notions of society, and the implicit terms of legislation.

Presently, however, in cases in which the alleged wrongdoer is the federal government and the claimed source of the right is constitutional, those suffering generalized injuries can confront an anomaly: relief for a plaintiff in minimalist terms may deny a government agency the opportunity to pursue a particular course of action, while failing to benefit the plaintiff in any tangible way.[47] Such claims seemingly offer courts the option of holding either that the action by the government, however morally wrong, does not create the kind of injury that gives the plaintiff standing, or that, given the government's conduct, no one should be entitled to benefits.[48] But notwithstanding the fact that judges anguish over the "far more difficult issue"[49] of standing in these cases, prudentialism has retained its dominant influence. The minimalists, however, demand more than empathy. They embrace the notion that a plaintiff's right to litigate generalized constitutional injuries sometimes may be required in order to vindicate a person's status as a member of society.

The two groups also disagree on the implications to be drawn from the alternative sources of standing. Prudentialists believe that, in light of the political alternative, courts ought to husband their resources and prestige. They justify this restrictive approach to standing as a means of 1) keeping the federal court caseload at a manageable level; 2) giving effect to our tripartite system of governmental comity; 3) protecting the courts from political retaliation by the Congress; and 4) avoiding disputes that essentially involve

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note 20, at 427; Broderick, *The* Warth *Optional Standing Doctrine: Return to Judicial Supremacy?*, 25 CATH. U.L. REV. 467, 473-82 (1976); *infra* text accompanying notes 106-08.

47. For example, in NAACP v. Harris, 607 F.2d 514, 516 (1st Cir. 1979), black leaders instituted a civil rights suit to enjoin HUD disbursements to the City of Boston under the Urban Development Action Grant program (UDAG), 42 U.S.C. § 5318 (Supp. IV 1980). The petitioners sought the injunction as a means of insuring blacks and hispanics equal access to the benefits of funded projects. The Court's consolidated opinion also included Latinos Unidos De Chelsea En Accion v. Harris, in which a group representing hispanic residents and four individual hispanics sought to restrain HUD's UDAG award to the City of Chelsea, Massachusetts. In both cases, the district court denied temporary relief and dismissed the UDAG claims for lack of standing. 607 F.2d at 516. The court of appeals affirmed, holding that black residents of minority neighborhoods (who were also elected representatives of the state legislature) though dedicated to working to eradicate racial discrimination in housing and employment on behalf of their constituents, did not have the requisite personal stake in the action to obtain standing. *Id.* at 523.

48. 607 F.2d at 519.

49. Knoxville Progressive Christian Coalition v. Testerman, 404 F. Supp. 783, 788 (E.D. Tenn. 1975); *see also* City of Hartford v. Town of Glastonbury, 561 F.2d 1032, 1040 (2d Cir. 1977) (noting that "[t]he more difficult issue is whether the plaintiffs have been injured in fact"). These cases suggest judicial discomfort with the formalistic nature of the standing doctrine to the extent that it requires courts to bar the door to plaintiffs for whom even judges recognize the pain.

debates over government policies rather than the meaning or application of laws.[50] Thus, even when an injury growing out of a constitutionally or statutorily protected status arguably exists, prudentialists insist that the injury be examined closely in order to assure that it is an injury that actually affects the plaintiff and is so causally connected to the defendant's conduct that only judicial action will assure plaintiff's relief.[51]

The Court explored the requirement for a sufficient interest in *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP).[52] In *SCRAP,* various environmental groups protested the Interstate Commerce Commission's (ICC) failure to suspend increased freight rates imposed by the nation's railroads.[53] SCRAP argued that the new tariff increase discouraged the use of "recyclable"[54] materials and adversely affected the environment. At issue was whether the Court's prior interpretation of the injury-in-fact requirement limited Congress' attempt to statutorily extend the right to sue in the environmental area.[55] In an earlier case, *Sierra Club v. Morton,*[56] the Court held that an environmental club lacked standing to enjoin federal officials from approving a ski development in a national forest. In *SCRAP,* however, the Court noted that its decision in *Sierra Club* was based not on the fact that the injury was widely shared, but rather on the fact that no specific injury was alleged by the litigants themselves.[57] In contrast, members of SCRAP "claimed that the specific and allegedly illegal action of the Commission would directly harm them in their use of the natural resources of the Washington Metropolitan Area."[58] Because SCRAP conceivably could prove its allegations, it had standing to protect its economic, recreational, and aesthetic interests from pollution arising from the ICC's disincentives to ship recyclable materials.[59]

The nexus between the injury asserted by the plaintiff and the governmental conduct against which judicial relief was sought was further examined in *Linda R.S. v. Richard D.*[60] In *Linda R.S.,* mothers of illegitimate children filed a class action suit to enjoin the "discriminatory application"[61] of a Texas statute which stated that any "parent" who failed to support his or her "children" was subject to prosecution. The statute, however, had always been construed judicially as applicable only to married parents.[62] On the basis of the equal protection clause, plaintiff sought an injunction to pro-

50. *See supra* text accompanying notes 38-40.
51. *See id.*
52. 412 U.S. 669 (1973).
53. *Id.* at 675-76.
54. *Id.* at 676.
55. *Id.* at 686-88.
56. 405 U.S. 727 (1972).
57. 412 U.S. at 687; *see supra* note 35.
58. 412 U.S. at 687.
59. *Id.* at 686.
60. 410 U.S. 614 (1972).
61. *Id.* at 614-15.
62. *Id.* at 615.

hibit the local district attorney from refraining from prosecuting the father of her child.[63] The Court held for the defendant, stating that "in the unique context of a challenge to a criminal statute, appellant has failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention."[64]

Justice Marshall noted that before the merits could be reached, the plaintiff must show that the pleaded facts presented a constitutional "case or controversy,"[65] and that the mother was a proper plaintiff to raise the issues. The Court conceded that the plaintiff had shown an injury-in-fact from the district attorney's failure to prosecute the father. Nevertheless, the Court concluded that a logical nexus between the status asserted and the claim had not been established.[66] The appellant had not shown that her failure to secure support payments resulted from the nonenforcement of the statute against her child's father.[67] In the Court's view, the appellant's injury was not related to the enforcement of the criminal statute, but to the putative father's recalcitrance.[68]

2. *The Seat of the Standing Problem*

a. *An Historical Concern*

As indicated by the prudential concerns with judicial scrutinization of injury, standing is a combination of several positions which the Court has formulated to meet various situations. The Court has insisted that a plaintiff not only suffer an injury, but that the injury be causally related to the defendant's conduct.[69] Moreover, the required injury must be one that differentiates the plaintiff from members of the society in general.[70] Thus, the Court has sought to contain an expansion of the right of those suffering generalized injuries to sue, while avoiding the failing in *Frothingham* to do so on a principled basis. Having found the absolute barrier of *Frothingham* too restrictive, the Court sought an equitable accommodation in *Flast*. Injury-in-fact clearly was to be required in both the statutory and constitutional contexts.[71] Beyond this, the Court recognized only those plaintiffs seeking to vindicate injuries arising from either congressionally identified wrong-doing or the breach of explicit constitutional limits.[72]

Eventually, when *Flast*'s limit-nexus articulation of the requirements for standing proved too broad to rule out "public action" suits,[73] judicial scrutiny

63. *Id.* at 616.
64. *Id.* at 617-18
65. *Id.* at 616.
66. *Id.* at 618-19.
67. *Id.*
68. *Id.*
69. *See supra* note 16.
70. *See* Frothingham v. Mellon, 262 U.S. 447, 488 (1923).
71. *See* 392 U.S. at 102-03.
72. *See supra* note 35.
73. *See supra* note 11.

of each injury increased. This increased scrutiny involved a set of qualifying considerations based on the Court's willingness to allow vindication of only certain kinds of injuries. Courts were to address the claims of all who were injured-in-fact, so long as the claims were cast in a form traditionally capable of judicial resolution.[74] A personal stake in the outcome of the dispute was required of every plaintiff; however, close scrutiny of the injury conferring the personal stake provided a rationale for limiting generalized disputes involving constitutional claims. Plaintiffs were to show a nexus between their injury and the government action,[75] but the relief requested would have to remedy the challenged conduct.[76]

In large part, therefore, the newly stated tenets of the standing doctrine were refinements, reflecting the need for the Court to elaborate on its past concerns. Taxpayer standing under these new tenets was strictly defined and citizen standing was resolutely avoided. A cost was paid, however, in doctrinal clarity. In application, the newly refined standard skirted the minimalists' primary objective of providing recourse against the government for widely suffered intangible injuries. According to minimalists, the sufficient personal stake requirement was not so much a manageable test as a manipulative one. Left unaddressed, moreover, was the extent to which scrutinization of the sufficiency of the injury affected statutory claims.[77] The demand for a traditionally cast dispute embodying a judicially quantified notion of a sufficient injury was insensitive to Congress' desire for increased judicial relief for certain generalized injuries.[78]

b. Modern Standing

The sufficiency requirements reached fruition in *Warth v. Seldin*.[79] In

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74. *See supra* note 21.

75. *See supra* text accompanying notes 52-59. The requirement for increased scrutinization also carried with it new possibilities for challenging *scintilla juris* injuries for statutorily based claims. For a discussion of Justice White's concerns in *SCRAP*, see *supra* note 35.

76. *See supra* text accompanying notes 60-68.

77. *See supra* note 35.

78. For example, in Simon v. East Ky. Welfare Rights Org., 426 U.S. 26 (1976), the Court refused standing to a group of low-income citizens and organizations representing them. Plaintiffs challenged policy regulations promulgated by the Secretary of the Treasury and the Commissioner of Internal Revenue on grounds that, contrary to congressional intent and the Administrative Procedure Act, the policy had the effect of encouraging hospitals to deny services to indigents by reducing tax incentives to treat the poor at federally-assisted hospitals. The Court required that plaintiffs establish that "the asserted injury was the consequence of the defendant's action, or that prospective relief will remove the harm." *Id.* at 45. As one commentator has noted:

> On the way to its decision, it was necessary for the Court to confront the tension between the more permissive implications of *Data Processing, Sierra Club,* and *SCRAP* and the more demanding requirements of *Linda R.S.* and *Warth.* The resolution . . . denuded the *SCRAP* case . . . [and] failed to perceive the differing policy considerations in standing inquiries in statutory as opposed to constitutional contexts.

Comment, *Standing to Sue in Federal Courts: The Elimination of Preliminary Threshold Standing Inquiries,* 51 TUL. L. REV. 119, 141 n.131 (1976).

79. 422 U.S. 490 (1975).

Warth, a group of Rochester-area petitioners[80] brought an action for damages and for injunctive and declaratory relief against the town of Penfield and members of its zoning, planning, and town boards. The Second Circuit dismissed the action for lack of standing.[81] On appeal, the petitioners alleged that the town's zoning ordinance, by its terms and as enforced, effectively excluded residents of low and moderate income[82] in violation of the petitioners' first, ninth,[83] and fourteenth amendments rights.[84]

Writing for the five to four majority, Justice Powell began with the characteristic observation that: "[I]n essence the question of standing is whether the litigant is entitled to have the Court decide the merits of the dispute or of particular issues."[85] This determination, he explained, "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise."[86] The basic question, the Court reasoned, was whether the constitutional or statutory provisions underlying the claims granted particular plaintiffs a right to judicial relief.[87] This determination,

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80. Petitioners consisted of: (1) Metro-Act of Rochester, a not-for-profit corporation whose members resided in Rochester and Penfield and whose purpose was the fostering of action to alleviate the housing shortage for low- and moderate-income persons in the Rochester area; (2) several individual Rochester taxpayers; and (3) several Rochester area residents with low or moderate incomes who were also members of minority racial or ethnic groups. Also involved were two organizations that had sought unsuccessfully to intervene below as party-plaintiffs: Rochester Home Builders Association, consisting of a number of residential construction firms in the Rochester area, and the Housing Council in the Monroe County Area, a not-for-profit corporation consisting of a number of organizations interested in housing problems. *Id.* at 493-95.

81. 495 F.2d 1187, 1195 (2d Cir. 1974).

82. 422 U.S. at 493. Allegedly, under a 12-year-old ordinance, the Town Zoning and Planning Boards had unreasonably designated 98% of Penfield's vacant land for single-family detached housing and only 0.3% for multifamily residences (apartments, townhouses, and the like). Exclusionary requirements for lot size, setback, floor area, habitable space, and low density were also said to have been used to increase the cost of Penfield's housing beyond the means of low and moderate income persons. As a result, minority racial and ethnic groups—the Rochester area's relatively poorer economic groups—were allegedly excluded from living in Penfield. Furthermore, to support persons relegated to residing in Rochester, the named petitioner-taxpayers of Rochester (and others similarly situated) were allegedly forced to pay higher taxes than otherwise necessary. *Id.* at 495-96.

83. The ninth amendment of the Constitution provides:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

U.S. CONST. amend. IX.

84. 422 U.S. at 493. Plaintiffs claimed protection under three federal statutes—42 U.S.C. §§ 1981, 1982 and 1983 (1982). The first two sections prevent discrimination, particularly in housing, while the familiar § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

85. 422 U.S. at 498.

86. *Id.* at 498 (citing Barrows v. Jackson, 346 U.S. 249, 255-56 (1953)).

87. *Id.* at 500.

in turn, was dependent upon whether the plaintiffs could show either an express constitutional or statutory right to relief, or a right implied derivatively from a right of action expressly granted to a third party. Whether express or implied, however, the Court stated that petitioners were required to allege distinct and palpable injuries, even if the injuries were shared by a large number of other possible litigants.[88] It was this latter consideration, the lack of a distinct and palpable injury, which led the Court to deny standing.

Of the four petitioners who asserted standing as low or moderate income citizens, the Court noted that none had a present interest in Penfield property; none was personally subject to the strictures of the allegedly illegal zoning ordinance; and none had ever personally been denied a variance or permit by Penfield's officials.[89] The Court, therefore, determined that either (l) the petitioners failed to allege facts from which it could be reasonably inferred that absent the respondents' restrictive zoning practices a "substantial probability" existed that the petitioners would be able to purchase or lease property in Penfield[90] or (2) the granting of the requested relief would permit the petitioners to live in Penfield.[91]

The low and moderate income petitioners' lack of housing was viewed as traceable, not to petitioners' personal deprivations, but to respondents' enforcement of the ordinance against others—developers, builders and the like.[92] This possible dependence upon the rights of third party commercial interests made it necessary for the petitioners to show that, absent the respondents' conduct, specific projects would have been built at prices they could have afforded.[93] Thus, the Court concluded that the petitioners' claim relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise and might improve were the Court to afford relief."[94]

The Court also rejected the petitioners' argument that Penfield's exclusion of low and moderate cost housing forced the City of Rochester to allow more tax abatements which in turn were reflected in higher taxes paid by Rochester taxpayers.[95] Because the petitioners themselves were not subject to the Penfield zoning practices, the Court viewed this claim as an attempt to assert that Penfield's zoning ordinance and practices violated the constitutional and statutory rights of third parties—persons of low and moderate income allegedly excluded from Penfield.[96]

As for the petitioner-associations, Metro-Act, Home Builders, and Housing Council, the Court again concluded that the standing doctrine barred

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88. *Id.* at 501.
89. *Id.* at 502, 504.
90. *Id.* at 504.
91. *Id.*
92. *Id.*
93. *Id.* at 505-06.
94. *Id.* at 507.
95. *Id.* at 508-09.
96. *Id.* at 509.

judicial resolution. The Court admitted that Metro-Act, a non-profit organization whose purpose was to provide low and moderate income housing, could have standing to seek judicial relief for any injuries to itself, or to vindicate the "associational" rights of its members.[97] The Court, however, noted that the association had not asserted an injury to itself[98] and thus had failed to achieve representational standing by alleging facts sufficient to establish a justiciable case.[99] Accordingly, the Court held that Metro-Act's claim to sue on its own behalf as a Rochester taxpayer, or on behalf of its taxpayer members, failed for the same reason that the claims of its individual-petitioners failed: the injury to the association or its members was not a judicially cognizable injury.[100]

The Court also rejected Metro-Act's claim that it should have standing since it represented members deprived of the benefits of living in a racially and ethnically integrated community. The Court, relying on *Trafficante v. Metropolitan Life Ins. Co.,* stated that the petitioners failed to allege an article III "case or controversy."[101] In *Trafficante,* standing was predicated upon a clear congressional purpose embodied in the Civil Rights Act of 1968. Congress had broadened the definition of the term "person aggrieved"[102] contained in that Act, which indicated that Congress intended to encourage private suits. In the *Warth* Court's view, however, the petitioners' complaint could not be construed to state such a claim.[103]

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97. *Id.* at 511. *Compare* Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (Sierra Club denied standing to maintain action where it did not allege individualized harm to itself or its members, but rather sought to do no more than vindicate its value preferences through the judicial process) *with* NAACP v. Button, 371 U.S. 415, 428 (1963) (NAACP has the right to assert corresponding rights of its members because it is directly engaged in those activities claimed to be constitutionally protected which the statute would curtail) *and* NAACP v. Alabama, 357 U.S. 449, 458-60 (1958) (NAACP has the right to assert on behalf of its members a claim that they are entitled under the Constitution to be protected from a state compelling them to disclose their affiliation with the Association).

98. 422 U.S. 510. In fact, the Court said:

> No relationship, other than an incidental congruity of interest, is alleged to exist between the Rochester taxpayers and persons who have been precluded from living in Penfield. Nor do the taxpayer-petitioners show that their prosecution of the suit is necessary to insure protection of the rights asserted, as there is no indication that persons who in fact have been excluded from Penfield are disabled from asserting their own right in a proper case.

Id.

99. *Id.* at 511.

100. *Id.*

101. 409 U.S. 205 (1972).

102. 422 U.S. at 512. Section 810(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(a) (1983), provides in relevant part:

> *Any person* who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. . . .

Id. (emphasis added)

103. 422 U.S. at 513. The Court noted further that the *amicus* brief of the Lawyers Com-

Assuming *arguendo* that harm to Metro-Act's Penfield members was sufficiently direct and personal for article III purposes, the Court had a second reason based on prudential concerns for denying standing. Since Penfield residents had not been denied any constitutional rights, the Court reasoned that the suit was merely an attempt to raise the putative rights of third parties—blacks and Puerto Ricans who had been discriminated against.[104] Similarly, Home Builders, which had intervened and asserted standing to represent its member firms engaged in the development of residential housing in Rochester and Penfield, failed to show that it or any of its members had suffered harm.[105]

Finally, the Court dismissed petitioner Housing Council. Of the seventeen groups included in the membership of the Housing Council, only one, Penfield Better Homes Corp., had focused its efforts on developing low to middle income housing in Penfield.[106] For three years, however, none of the seventeen groups had taken steps toward building in Penfield. Under these circumstances, the Court reasoned, neither the complaint nor the record supplied a basis to infer that a concrete dispute still existed at the time of filing or that respondents' actions continued to block a current construction project.[107] Thus, Better Homes's claim was, at best, moot.[108]

Given the majority's prudentialist perspective, rejection of the *Warth* claims was not unexpected. The Court could either accept suits that in its view were essentially based on political claims, or flatly re-affirm the prudential limits upon which the majority's view of political comity rested.[109] The Court chose the latter course while repeatedly indicating that it remained within Congress' power to supersede the Court's prudential concerns.[110]

The dissenting opinions in *Warth* of Justice Douglas[111] and Justice Brennan,[112] with whom Justices White and Marshall concurred, were uncompromisingly critical. Justice Douglas focused upon the institutional implications of the Court's decision, stating that "the Court reads the com-

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mittee for Civil Rights under Law had argued the existence of a claim under the 1968 Act, but observed pointedly:

> It is significant, we think, that petitioners nowhere adopt this argument. . . . Instead, the gravamen of the complaint is that the challenged zoning practices have the purpose and effect of excluding persons of low and moderate income from residing in the town, and that this in turn has the consequence of excluding members of racial or ethnic minority groups.

Id. at 513 n.21.

104. *Id.* at 514.

105. *Id.* at 515.

106. *Id.* at 516.

107. *Id.* at 517.

108. For a discussion of the mootness claim in a similar case, see Broderick, *supra* note 46, at 475.

109. This was in essence the position Justice Harlan had urged in Flast v. Cohen, 392 U.S. 83 (1968). *See supra* note 17.

110. 422 U.S. at 500, 509, 514.

111. *Id.* at 518 (Douglas, J., dissenting).

112. *Id.* at 519 (Brennan, J., dissenting).

plaint and the record with antagonistic eyes."[113] Justice Brennan derided it as an "opinion that purports to be a standing opinion but that actually has overtones of outmoded notions of pleading and of justiciability . . . explained only by an indefensible hostility to the claim on the merits."[114] This disagreement echoed the decades-old debate over the Court's role in a government of shared powers and the difficulty of fashioning a rule compatible with the concept of a non-political judiciary in a tripartite system.[115]

For Justices Brennan and Powell the standing debate had reverted to the concerns of 1923 and the Douglas-Harlan exchange over whether non-Hohfeldian plaintiffs were constitutionally excluded from suing in federal courts.[116] The prudential majority, however, had become more adroit; spurred perhaps by the sharpness of the long debate and the Court's uneasiness with the fact that a consensus doctrine continued to elude it. Nevertheless, by doctrinal increments prudentialists had achieved a hard-fought ascendency. *Warths* was the centerpiece, the Chief Justice its leading spokesman, and Justice Powell its primary theoretician.

Broadly stated, standing consists of two categories of claims that are made up of subsets identifying the types of interests involved. By context, a claim is either statutory or constitutional.[117] Statutory and constitutional claims are further divided as either direct or diffuse.[118] In addition, the diffuse claims can be further identified as consisting of either generalized or associational interests.[119] Finally, all subsets are subject to the basic requirement that there

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113. *Id.* at 518 (Douglas, J., dissenting).

114. *Id.* at 520 (Brennan, J., dissenting).

115. *See supra* note 21.

116. *See supra* notes 17 and 35.

117. The statutory context includes all claims which are premised on the assertion that Congress has passed upon the right for the plaintiff to bring the action. The constitutional context, by contrast, includes those claims which are premised on rights established by the Constitution (e.g., the first amendment's prohibition of the establishment of religion, or the fourteenth amendment's guarantee of equal protection). Noteworthy is the fact that congressional involvement in the statutory context means that courts are engaged in an attempt to confirm whether a particular plaintiff has suffered the kind of injury Congress had deemed worthy of vindication. The constitutional context, however, is more intrusive, and therefore, is approached more cautiously by the courts. In the latter context, courts look over the shoulder of the Congress and the Executive to determine whether a plaintiff has suffered an injury that he should be allowed to redress.

118. Direct and diffuse type claims are defined in relationships to each other. Direct claimants assert that they, but not necessarily others, have been personally and singularly injured by defendant's wrongful conduct. For example: Defendant negligently ran his or her car into me, unconstitutionally prevented me from publishing, or failed to release information under the Freedom of Information Act. Diffuse claimants, on the other hand, involve plaintiffs asserting that they, and necessarily others, have been injured by the defendants' wrongful conduct. For example: Defendant failed in its duty not to tax or expend funds for the establishment of religion, to provide a statement and account of congressionally authorized expenditures, or to refrain from polluting the air in the city where I live. While the typologies are only illustrative and necessarily overlapping, any direct claim may vindicate the rights of but one individual, and no diffuse claim can vindicate the rights of but one individual.

119. The diffuse-type subcategories identify two different types of claimants who vindicate

be an injury-in-fact.[120] The plaintiff must allege a sufficient interest in a dispute that is individually palpable, causally related to the defendant's conduct, and capable of judicial resolution.

Each type of claim under the *Warth* scheme demands increasingly more exact expressions of congressional or constitutional intent to obtain standing. For example, statutory direct and diffuse claims are normally accepted. The *Warth* scheme, however, calls for strictly limiting standing claims that are constitutionally diffuse. In the constitutional context, only diffuse claims that are based upon an associational theory are treated sympathetically by the Court and then only to the extent that the associational plaintiff represents an organization or a member who singularly could have qualified as a direct type plaintiff.[121] That is, the claimant must be personally and singularly injured by the defendant's conduct. The scheme is unsympathetic to plaintiffs asserting that they, like others, have been injured in an undifferentiated way by the government's unconstitutional conduct. Finally, constitutional diffuse-generalized claims are rejected except when they are based upon claims of taxation in violation of a specific constitutional limitation. Through this scheme the Court rejects flexible standards for standing based on judicial notions of constitutionally favored interests and seeks to limit any explicit judicial role in the broader political process.[122]

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the interests of others while vidicating their individual interests. When the coincidental vindication of the interest results because plaintiff's injury is widely shared—diffuse—the type is generalized. When the coincidental representation arises because the plaintiff is authorized to sue as an organization or on behalf of members of the organization, the type is associational. Given the overall scheme, in the statutory context, the diffuse category (with its distinction between generalized and associational plaintiffs) is not of primary importance because regardless of who might benefit from a litigant's suit, the existence of the statute means, by definition, that Congress has authorized the suit as a direct-type suit.

120. Injury-in-fact and, consequently, standing was recognized in United States v. SCRAP, 412 U.S. 669 (1973). Distinguishing this decision from Sierra Club v. Morton, 405 U.S. 727 (1972), Justice Stewart noted that:

> In interpreting "injury in fact" we made it clear that standing was not confined to those who could show "economic harm,". . . . Nor, we said, could the fact that many persons shared the same injury be sufficient reason to disqualify from seeking review of an agency's action any person who had in fact suffered injury. Rather we explained: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process" (*Sierra Club,* 405 U.S. at 734). Consequently, neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing.

412 U.S. at 686-87.

The problem with the injury-in-fact requirement, however, is that even when it is found to exist, the Court often glosses over an implicit conclusion that the injury is a "sufficient" injury—the kind of injury of which the Court should take cognizance. *See supra* note 35.

121. This is because associational claims are in reality direct claims which are being litigated by a representative.

122. In United States v. Richardson, 418 U.S. 166 (1974), the Chief Justice summarized the prudentialists' jural-political view:

In essence, *Warth* attempts to synthesize, rather than radically expand, the Court's prior prudential tendencies.[123] This synthesis is especially evident in the Court's adherence to restrictive notions of pleading in regard to its categorization of proper claimants and limits based on the factual context of the claim.[124] This is both the major strength and weakness of the model. The juxtaposition by category of the possible claims of those seeking standing helps to explain their differences, but also underlines the contradictions in the Court's response. While little judicial difficulty has been encountered in allowing litigants to sue in the statutory or constitutional direct categories, the scheme's difficulty becomes apparent in the contrasting treatment accorded the statutory diffuse and constitutional diffuse claims. Although the Court recognizes the diffuse claims of both generalized and associational plaintiffs under the statutory category, such recognition on the constitutional side is limited. Constitutional diffuse claims, unlike statutory diffuse claims, allow standing to sue only with respect to a narrow category of constitutional claims—those challenging the taxing and spending powers.[125] Other diffuse constitutional claimants are viewed, at best, as inchoate or, less optimistically, as nonexistent. Consequently, constititutional diffuse standing is available only under an associational theory—when the plaintiff's organization has suffered an injury independently of the organization's members or when the organization has been designated to speak for its injured members.[126] More importantly, as a practical matter, constitutional diffuse-generalized standing is simply claimed to be nonexistent.[127] The question raised

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> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims give support to the arguments that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a *representative* Government with the representatives directly responsible to their constituents at stated periods of two, four and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch.

Id. at 179 (emphasis in original).

123. *See supra* text accompanying note 50.

124. *See supra* note 35 and text accompanying notes 42-43.

125. *See* Flast v. Cohen, 392 U.S. 83 (1968); Doremus v. Board of Educ., 342 U.S. 429 (1952); Everson v. Board of Education, 330 U.S. 1 (1947).

126. *See supra* note 97.

127. In Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982), the Court emphasized its unwillingness to expand the concept of standing for generalized interests beyond the limits of *Flast*. *Id.* at 489. In *Valley Forge*, the taxpayer-plaintiff's right to sue was predicated on (1) a liability for taxes that made him "a proper party to allege the unconstitutionality only of exercises of Congressional power under the taxing and spending clause of Art. I § 8, of the Constitution," and (2) the requirement that the taxpayer "show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power. . . ." *Id.* at 478-79 (quoting Flast v. Cohen, 392 U.S. 83, 102 (1968)). The Court concluded that "were it to accept respondents'

is why, in the constitutional context, there is only a limited basis for plaintiffs to vindicate generalized injuries. The absence of such relief bears directly on whether the Court has achieved an articulation of standing that is likely to provide doctrinal stability and, if not, the attendant costs of its failure to do so.

3. *Setting Forth The Policy on Which the* Warth *Scheme Stands*

a. *The Politics of Procedure*

The Court has pointed consistently to certain considerations as underlying its prudential approach: the need for factual and issue certainty; the need to avoid interference with the workings of other branches; the need to limit the judiciary's workload to those disputes that are judicially cognizable; and the need to emphasize the uniqueness of judicial relief.[128] These considerations are not lightly dismissed. They envision a Court that is a deliberate, restrained institution sensitive both to its relationship with coordinate branches of government and to the limits of its powers. As basic considerations, these objectives are not challenged by minimalists; rather, it is their implication in particular situations that is of concern. As justification for the prudentialists' desire to bar plaintiffs who suffer constitutionally generalized injuries, these considerations need not require an absolute prohibition against non-taxpayer litigants seeking to vindicate generalized injuries. In light of the realization in *Flast* that no absolute barrier exists to prevent claimants from vindicating even the minute intangible injuries facing taxpayers, it is inconsistent to assert that only Congress has the knowledge and power to protect generalized interests. The Court's recognition of statutory diffuse claimants and not constitutionally diffuse claimants is a policy choice. As such, it fails to acknowledge the decision of the Constitution's framers to leave to the Court the determination as to whether non-Hohfeldian plaintiffs should be allowed to vindicate their rights. Viewed as a policy question, the prudentialists' determination that generalized standing should not be allowed, except in taxpayer situations, is questionable.

In short, when explained as a constitutionally required limit on the Court's authority the considerations are compelling; but when viewed only as justification for self-imposed limits, they cannot be persuasive when imposed without consideration of the facts involved. Even though political comity, self-restraint, preservation of judicial resources, and the promotion of judicial esteem are worthy goals, the Court must nevertheless articulate the rationale for its approach in order for its resolution to be accepted. Closer scrutiny

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claim of standing as citizens claiming injury to their shared individuated right to a government prohibited from making laws respecting religion, there would be no principled basis for confining such an exception to litigants relying on the Establishment Clause." *Id.* at 489. The Court noted that the proposed exception "derives from the idea that judicial power requires nothing more for its invocation than important issues and able litigants." *Id.*

128. *See supra* note 38-39 and accompanying text.

is required of the prudentialists' claim that the failure to limit the standing doctrine would unjustifiably open the federal court doors to false controversies. The premises underlying this assertion must be recognized as comprising a jural-political model—a description of the judiciary's interaction with the legislative process. Though the scheme is highly simplified here for the sake of emphasis, the *Warth* jural-political model posits dispute resolution as being a product of democratically fractionalized power-sharing involving three autonomous branches of government. Each branch is seen as seeking authority by specializing in declaring, defining, or administering governmental power in conjunction with, but independently of, the other branches of government.[129]

Under this role model, certain disputes are denied access to the judicial system. To the extent that access to the judiciary is foreclosed, however, the Court seeks to do so impartially—without addressing the merits of the disputes that it directs to other branches of government. But the Court's procedural attempt to resolve standing questions is troublesome because of its failure to appreciate the full significance of the standing doctrine's roots in the judiciary's own institutional concerns. First, while the Court is directing generalized disputes to Congress and the Executive, each of these branches may be similarly driven by intra-institutional decisions to avoid difficult questions by directing them to the other branches. Second, even if the Court articulates a standing test that passes the procedural justice requirement that like cases be treated alike, it does not necessarily mean that the Court has developed a fair rule.

The first of these concerns directly raises the relationship between procedure and policy-making. It is insensitivity to this relationship that blinds the *Warth* scheme to the fact that Congress, too, is subject to practical and prudential limitations governing the disputes it can consider. Indeed, the very essence of our legislative process is the fact that Congress is a political forum.

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129. More fully stated, the model proffers that courts exist in a democratic society to resolve disputes which are not amenable to resolution through other processes. Constitutional process and democratically elected assemblies provide the preferred method for resolving those disputes about which there exist no settled consensus as to the standards that ought to be applied. Thus, the legislative arena is the proper forum when a question is one of first impression; one of public focus due to heightened political attention; or one for which the applicable standards are settled, but the consequences of their application are in need of reconsideration. In contrast, the judiciary's role is reserved for resolution of those disputes in which no legislative body has announced the applicable standard. Consistent with the democratic commitment to representative government, therefore, the judiciary is required to defer to the public's representatives for all questions for which no standards have been declared previously. Just as readily, however, once the legislature has spoken (whether directly through the legislation or indirectly by allowing prior judicial determinations to stand after legislative consideration) the judiciary should be constrained to declare the law as it has been stated. *Cf.* Logan, *Standing to Sue: A Proposed Separation of Powers Analysis,* 1984 WIS. L. REV. 37, 41 (separation of powers doctrine suggests overlapping reservoirs of responsibility and necessitates a dynamic process of interaction—a dialogue between the branches). *See generally* Fuller, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353 (1978) (detailing the boundaries of adjudicative power).

Thus, a decision by the Courts to defer to Congress rather than decide a dispute often is the same as deciding the matter adversely.[130] Moreover, because a legislative agenda is primarily a reflection of the power relationships existing in society, the issue that must be addressed is whether deferring matters to Congress is likely to achieve substantive deliberations. After all, the moral force of the policy model's political comity argument rests on the assumption that such deliberations occur.[131] By relegating disputes to a hostile or disinterested legislature, courts reinforce the sense of helplessness that initially brought the plaintiff to litigate. In a government of shared powers, judicial solutions that are recognizable as just are precluded when courts fail to act due to a lack of standards and the legislature in turn fails to act because of a lack of political consensus or its intent to defer the matter to the courts.

The dilemma is even more troubling when it is realized that, in the absence of both a judicial and legislative solution, political minorities are left to the laissez-faire whims of the majority in the private political arena.[132] Implicit in the prudential policy model, however, is a basic presumption: absent governmental intervention by the judiciary, the results of a dispute will ultimately reflect the wishes of those citizens in the best strategic position to exploit a given opportunity and thereby produce the most socially advantageous result. Therefore, by narrowly restricting constitutionally based claims, the required judicial inquiry under statutory standing need focus only upon whether the law-making body clearly addressed a specific political interest under particular legislation.[133] Thus, in the *Warth* dispute, which involved the allocation of rights in a community,[134] the prudentialist model posits that, absent a legislative or constitutional direct basis, it is not the Court's role to determine how a community's resources should be allocated. That determination should be made by an appropriate political body or by private negotiations between the opponents based upon some agreed quid-pro-quo.[135]

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130. It may be asked legitimately whether the decison not to allow standing is always motivated by a desire to defer to Congress or the Executive. Is it not sometimes the case that the courts are seeking to affirm a previously announced legislative result? As used here, however, deference encompasses both situations. The jural-political model posits that if Congress has not previously addressed the existence, *vel non,* of the right to litigate generalized grievances against the government, then it must be afforded the opportunity to do so. Conversely, if Congress has considered the issue, its determination must govern. In either event, it is the political process and not the court that dictates the recognition. Generalized standing may exist, but outside the taxpayer situation it exists, if at all, because the political process has statutorily declared it.

131. For Jaffe's view of the democratic charter see *supra* note 45. *See also* J. RAWLS, A THEORY OF JUSTICE 11-22, 118-92 (1971) (discussing the principles of justice which underlie the basic structure of society); Greenberg, *Legitimating Administrative Actions: The Experience of the Federal Energy Office*, 51 U. CIN. L. REV. 735-43 (1982) (noting the difficulty inherent in determining the contours of delegated power).

132. *See* Cayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1311 (1976) (warning that interest representation results in an inevitable incompleteness).

133. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974).

134. 422 U.S. at 493.

135. City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1670 (1983).

In theory, if the objective is worth pursuing, the legislative body will act and impose guidelines concerning the existence *vel non* of rights in such communities. Alternatively, by its failure to act, the legislature is deemed to have indicated *sub silentio* that the matter is to be left to the private arena.[136] Therefore, by essentially foreclosing constitutional diffuse-generalized claims, the Court implicitly weighs the social utility of opening its doors in order to oversee the allocation process against the asserted need to let market forces—political, social, and economic—work their will.

In view of these considerations, it is not surprising that the Court denied standing to the plaintiffs in *Schlesinger v. Reservists Committee to Stop the War,*[137] and *United States v. Richardson.*[138] Because of the Court's desire to restrict constitutionally based claims, the disputes in both cases can be viewed as attempts by litigants to have the Court undo legislative action. In *Reservists Committee,* present and former members of the Armed Forces Reserve, citizens, and taxpayers brought a class action suit against the Secretary of Defense for violating the incompatibility clause of the Constitution.[139] The former reservists argued that congressional memberships in the military reserve violated the incompatibility clause.[140] The Court held that as citizens, the plaintiffs lacked standing to sue because their injuries were too abstract.[141]

Though *Reservists Committee* was ostensibly a suit against the executive branch, if successful, its effect would have been to declare that Congress acted in violation of a plenary legislative bargain by permitting its members to serve as officers in the Reserves. The holding of Reserve commissions by Congress, however, was already a hallowed tradition. There was no basis for inferring that the existing situation was at variance with what a legislative consideration would likely produce. According to the Court, judicial abstention was required unless a plaintiff's claim was either affirmed by statute, fell within the limited exception for taxpayer standing, or stated a constitutional direct right. The Court's denial of constitutional diffuse-generalized standing in *Reservists Committee* effectively deferred the matter to the legislative and public arenas.

Richardson also involved a claim that was ostensibly against the executive branch, but which challenged an historically affirmed procedure which implicated Congress.[142] Respondent, a federal taxpayer, brought suit to declare the Central Intelligence Agency Act unconstitutional because a clause in the Act allowed the Director of the CIA to avoid disclosure requirements ap-

136. *See* United States v. Richardson, 418 U.S. 166, 179 (1974) (recommending that congressional failure to act should be corrected not by judicial intervention, but by resort to the ballot box).

137. 418 U.S. 208 (1974).

138. 418 U.S. 166 (1974).

139. 418 U.S. at 208.

140. *Id.* at 212.

141. *Id.*

142. 418 U.S. at 168-69.

plicable to public funds.[143] The Court recognized, however, that Congress had the power to order the disclosure of the CIA's budget.[144] For the Court, therefore, the issue did not involve the interpretation of standards; rather, the Court was faced with overturning the implicit non-disclosure standards which Congress had previously set. Under *Warth's* prudential scheme, substantive disagreements with congressional standards are matters for the political arena, and not for the Court.[145]

In contrast, *SCRAP,* as previously discussed, reveals the sympathetic statutory face of the *Warth* scheme.[146] Though the line of causation between the proposed rate hike and the despoiling of the environment was attenuated, the claim which the association's members made was well within the *Warth* policy scheme. The members asserted that Congress had already spoken regarding the applicable standard and thus, only the issue of causality was left for the Court to decide. Implicitly, plaintiffs asserted that referring the question to the legislative arena would be redundant because of an already existing consensus favoring litigation of these disputes.[147] In order to avoid

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143. *Id.* at 175.

144. *See supra* text at notes 109-10.

145. There were four dissents in *Richardson,* but the most important critique of the Chief Justice's opinion for the Court was not a dissent, but rather the concurring opinion of Justice Powell. 418 U.S. at 180 (Powell, J., concurring). Justice Powell's formulation of the standing issue was essentially bi-polar: If standing was to exist in the particular context the Court must either re-affirm pre-*Flast* prudential limitations or attempt new doctrinal departures. *Id.* at 184-85 (Powell, J., concurring). The majority however, was commited to making *Flast* work. Having begun with an application of the *Flast* "nexus" test to determine whether Richardson was a proper party to invoke federal judicial power, the majority answered in the negative, finding no logical nexus between the asserted status of taxpayer and the claimed failure of Congress to require a more detailed report of agency expenditures. *Id.* at 175. The dissenters, on the other hand, began their analyses with an examination of the existence of Richardson's asserted right. *Id.* at 197-98 (Douglas, J., dissenting), 202 (Stewart, J., dissenting). In their view the essence of Richardson's position was that of a traditional Hohfeldian plaintiff. *Id.* at 197-98 (Douglas, J., dissenting), 202 (Stewart, J., dissenting).

While Richardson was denied standing by a five to four vote, only four of the five agreed that the *Flast* nexus could resolve the matter. Justice Powell was adamant that the test was irrelevant and urged the Court to move explicitly to a consideration of prudential limitations. *Id.* at 184-85 (Powell, J., concurring). In his dissent, Justice Douglas failed even to mention the nexus test, preferring to consider only whether the Constitution implies a right for citizens to litigate the particular issue. *Id.* at 197-202 (Douglas, J., dissenting). Justice Stewart stated flatly that the asserted invasion of an affirmative duty made the test irrelevant since what was at issue was the expressed entitlement to sue rather than the need for the Court to determine whether such an entitlement exists. *Id.* at 202 (Stewart, J., dissenting).

Somewhat similarly, Justice Brennan asserted in *Schlesinger* that the standing requirement was met by a mere good-faith allegation that the challenged action caused an injury-in-fact. 418 U.S. at 237-38 (Brennan, J., dissenting). The "zone of interest" inquiry was relevant, if at all, only to limitations on the exercise of the judicial function such as justiciability and reviewability. *Id.* (Brennan, J., dissenting). With the exception of Justice Stewart's position, the breakdown of the yeas and the nays on the standing issue was the same in *Schlesinger* and *Richardson.*

146. *See supra* text accompanying notes 52-59.

147. *See id.*

a confrontation between the Congress and the Judiciary based upon standard-setting, the SCRAP members framed the issue as a question of statutory diffuse-associational standing.[148] SCRAP argued that each of its members suffered economic, aesthetic, and recreational harm due to the increased freight rates. Although the injury was widely shared and the inevitability of the injury was questionable, the Court concluded that Congress entitled plaintiffs to the vindication of their rights.[149] The Court stated that the asserted threat of harm would tangibly affect the plaintiffs, and judicial action would prevent the precisely identified harm.[150]

The *Warth* scheme, based upon the prudential policy model, is certainly not without appeal. The *Warth* goal to foreclose the expansion of constitutionally based standing is reasonably calculated to serve the Court's needs for controlling its caseload and avoiding intra-governmental disputes. Lacking, however, is a cogent response to Justice Harlan's observation that the Court's focus fails to test the worthiness of a *particular* litigant before the Court.[151] What is required is consideration of whether generalized claims can always be outweighed and whether, in the end, the Court views the question of standing only from the institutional perspective of the justices' seats. Such a perspective focuses on the Court's agenda ignoring the interrelationship between its agenda-setting and that of the other branches of government.

b. The Equity of Procedure

The dignitary concerns underlying standing principles require more than the uniformity of results achieved by the *Warth* scheme. A just procedural rule must also assure plaintiffs that a fair outcome will result by proper application of the rule. Thus, the just rule must persuasively respond to the fact that the reasonable expectations of would-be litigants will often be defeated. Although the *Warth* scheme provides a basis for consistent solutions, dignity concerns remain unrecognized. The protection of individual dignity requires that rules be agreed to and not merely imposed, for example, by a dominating powerful state. Agreement, in turn, makes concerns for both equality and equity essential to a fair standing rule. A procedural rule can be viewed as just, therefore, only so long as it succeeds in consistent application and is the product of a process in which the affected party had an opportunity to be heard and possibly to control the outcome.[152]

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148. *See supra* text accompanying notes 117-22.

149. 412 U.S. at 686.

150. *Id.*

151. *See supra* note 17.

152. *See* A. HIRSCHMAN, EXIT, VOICE AND LOYALTY 33-44, 76-77 (1970). Professor Hirschman emphasized the interrelationship between "voice"—the capacity of a member of a firm or social organization to articulate displeasure with the operations of the institution and "exit"—the economic and social option of withdrawing one's participation or support for a product or institution as a means of exercising influence. While recognizing that the presence of the exit option can sharply reduce the probability that the voice option will be utilized, Hirschman observed that,

Beyond these requisites for creating the procedurally just rule, however, lies the additional requirement for distributive justice. At this second level the outcomes of procedurally fair processes are tested. The concern here is cognitive—whether an injured party could endorse the result as appropriate. Regardless of the actual outcome, if the result is just, the affected party must be able to assert that the result did not call into question his or her status either as an individual or as a member of the group.[153]

Thus, even if the *Warth* scheme achieves the first level procedural requisites, it must still be determined whether litigants are stripped of their dignitary rights. This interplay between the requirements of procedural justice and the concern for distributive justice can be illuminated by two lines of analysis. First, with respect to procedural concerns, it is unlikely that an objective person unaware of his or her actual interest at the inception of a law-creating process, would have accepted a procedural rule for judicial matters that provided that, absent legislative authorization, courts are unable to resolve disputes involving widely shared injuries. Such a rule for judicial matters would potentially silence an individual's voice and destroy an opportunity to control what is perhaps one of the most crucial functions of government-dispute settlement. For potential political minorities, the inherent risk and practical difficulty of leaving it to others to determine whether to protect minority interests mark the *Warth* scheme as premised on an unjust procedural rule.

But the procedural rule of the *Warth* scheme also fails on distributive

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> exit is ordinarily unthinkable, though not always wholly impossible, from such primordial human groupings as family, tribe, church, and state. The principal way for the individual member to register his dissatisfaction with the way things are going in these organizations is normally to make his voice heard in some fashion.

Id. at 76.

The exit/voice concerns apply equally well to the role of courts in standing determinations. Absent the practical option of opting out of the state, the need to assure voice becomes critical. While Hirschman notes that the promotion of a special attachment to an organization—"loyalty"—generally can be used as a means of holding the exit option at bay while simultaneously activating the voice option, *id.* at 78, that solution is less plausible when the discontenting factor is the question of standing. First, the would-be litigant's loyalty is undermined precisely to the extent that he is barred from asserting a claim because the right to assert a claim before a neutral arbiter, i.e. voice, is a measure of his equal status with other members of the society generally and the disputant in particular. To this extent, exit—even if realistically available—provides no alternative because to exit is merely to concede the very status implicitly asserted by the decision to sue. Second, loyalty is undermined by a denial of standing to the extent that judicial resolution of a dispute with government is avoided in favor of deference to the legislature. By denying standing and leaving it to the legislature the judiciary effectively abrogates its duty to achieve justice while leaving the minority petitioner with no means to assert his or her rights.

153. As Justice Brennan noted in *Warth,* the Court in effect argued from the success of Penfield's scheme to exclude racial minorities and the poor, that the petitioners ought not to be allowed a forum to attack it. 422 U.S. at 523 (Brennan, J., dissenting).

Note too, that though the class of ostensibly unaffected persons and groups was large, the focus here is limited to racial minorities and the poor because they are particularly likely to be subjected to invidious discrimination.

justice grounds. This second inquiry asks whether an individual who has been affected by the current standing rule could rationally have accepted the result as one that did not challenge his or her dignitary status either as an individual or as a member of the group. Here, the test calls for a subjective determination but incorporates objective concerns as well. Both concerns are embodied in the following inquiry: Would the result require a party to accept certain costs for which no benefits were received in order to benefit someone else? If so, it is presumed that a potential claimant who was unaware of his or her actual condition at the inception of the law-making process would not rationally have accepted the rule imposing the burden.

In sum, an injustice occurs when an individual is forced to proceed pursuant to procedures that a rational person would not have endorsed initially, either because they failed to provide adequate assurance of equality, voice, and the possibility of control,[154] or because they assumed that an individual rationally accepts costs uniquely imposed upon him or her solely for the benefit of others. In the first situation procedural justice is absent; in the second situation distributive justice is absent. The absence of either requirement denies complete justice. Moreover, a doctrine based on a scheme that lacks either procedural or distributive justice cannot be fully persuasive.

In terms of complete justice, therefore, even if the procedural rule of the *Warth* scheme is accepted, the approach is inherently flawed. The Court has adopted a procedural rule that continuously raises distributive justice concerns regarding constitutional diffuse cases. For example, *Warth* involved injured persons who were also members of a minority racial group. Although not all constitutional diffuse claimants that have been denied standing fit this pattern, a striking characteristic of the unjust constitutional diffuse standing denial is that the plaintiffs are often members of a minority social group who seek to prevent an ostensibly democratic decision from being made. In *Warth,* the votes cast by the Penfield town leaders were ostensibly to allocate the town's land uses. These votes did not, on their face, implicate the rights of racial minorities, the poor, taxpayers, builders from the City of Rochester, or whites living in Penfield who desired integrated living. In actuality, however, the terms and the effects of the ordinance's enforcement suggest that Penfield's actions in allocating land use rights limited residence opportunities for minority racial groups and the economically disadvantaged. This is the same result that would have been expected under an overtly race conscious distribution of land use rights.

In terms of distributive justice, if the town's ordinance went beyond reasonable allocation concerns, and, *sub silentio,* gave vent to the town father's preferences regarding the land use rights of racial minorities and disadvantaged economic groups, an important moral issue was raised: The process in effect, allowed defendants to cast weighted votes that unjustly counted for more than those of plaintiffs.[155] A constitutional diffuse stand-

154. *See supra* note 152.

155. The analysis offered by Ronald Dworkin is cogent and deserves extended consideration:

ing rule that precludes racial minorities and the economically disadvantaged from challenging such a land use allocation fails the "complete justice" test on both procedural and distributive grounds. It fails on procedural justice grounds because, due to the foreseeable risk of weighted voting, no rational person could have agreed to this procedure at the inception of the lawmaking process. Nor can such a rule of standing be perceived as distributively just when it would cause racial minorities and the economically disadvantaged to bear the cost of exclusion for the benefit of the town, without corresponding benefit to either burdened group.[156] Furthermore, no standing rule that attempts to mollify complaints about the unfairness of the result by referring the dispute to the legislative arena can be considered responsive to the litigants' rights.

Given the *Warth* scheme's insistence on judicial adherence to democratic

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> The utilitarian argument, that a policy is justified if it satisfies more preferences overall, seems at first sight to be an egalitarian argument. It seems to observe strict impartiality. . . .
>
> [The suggestion is that utiltiarianism] not only respects, but embodies, the right of each citizen to be treated as the equal of any other. The chance that each individual's preferences have to succeed in the competition for social policy, will depend upon how important his preference is to him, and how many others share it, compared to the intensity and number of competing preferences. His chance will not be affected by the esteem or contempt of either the officials or fellow citizens, and he will therefore not be subservient or beholden to them.
>
> But if we examine the range of preferences that individuals in fact have, we shall see that the apparent egalitarian character of a utilitarian argument is often deceptive. Preference utilitarianism asks officials to attempt to satisfy people's preferences so far as this is possible. But the preferences of an individual for the consequences of a particular policy may be seen to reflect, on further analysis, either a *personal* preference for his own enjoyment of some goods or opportunities, or an *external* preference for the assignment of goods or opportunities, to others, or both. A white law school candidate might have a personal preference for the consequences of segregation, for example, because the policy improves his own chances of success or an external preference for those consequences because he has contempt for blacks and disapproves social situations in which the races mix.
>
> . . . If a utilitarian argument counts external preferences along with personal preferences, then the egalitarian character of that argument is corrupted, because the chance that anyone's preferences have to succeed will then depend, not only on the demands that the personal preferences of others make on scarce resources, but on the respect or affection they have for him or for his way of life.

R. DWORKIN, TAKING RIGHTS SERIOUSLY 234-35 (1977).

For a critical analysis of Dworkin's theory, see Richards, *'Taking Rights Seriously,' Seriously,* 52 N.Y.U. L. REV. 1265, 1296 (1977).

156. In the language of welfare economics, "externalities" are at issue. Externalities arise when some consumer's or producer's level of consumption of a good or service or production activities has a direct effect on the welfare of another consumer (as opposed to an indirect effect through the price mechanism) or directly affect the production activities of another firm. "The essence of externalities, whether in production or consumption, is that their costs or benefits are not reflected in market prices, and so the decision of the consumer or firm creating the externalities on the scale of the externality-creating activity generally does not take its effect into account." G. BANNOCK, R. BAXTER & R. REESE, THE PENGUIN DICTIONARY OF ECONOMICS 158-59 (1972).

checks and balances, it is ironic that the scheme inevitably leads to some rights being protected, if at all, only by extralegal means. For the constitutional diffuse claimant who is a member of a social minority and who has been denied standing, the present *Warth* rule is especially frustrating because it leaves such minorities with the feeling that nobody will listen to their claims. Thus, the Court underestimates the costs to society and misapprehends the complexities of inter-institutional dealings to the extent that it seeks to set its own agenda without addressing the internal operational concerns of the other branches. Moreover, by failing to fully credit the dignitary concerns of the would-be litigants, the Court undercuts the prospects for the emergence of a definitive doctrine of standing.

The major flaw is the Court's failure to view constitutionally based claims as the equivalent of statutorily based claims. While the *Warth* scheme allows diffuse-generalized standing predicated upon Congress' conferral of rights, it rejects these rights when the claim is predicated on constitutional grounds. According to the Court, the decision to credit the congressional source and not the constitutional one is dictated by practical necessity: courts do not have a principled basis for differentiating between constitutional provisions as particular sources of generalized rights.[157] If this is so, the reasons for the lack of a principled basis should be candidly admitted to be political and philosophical rather than jurisprudential. The Court's difficulty in large part results from an unwillingness to wrestle with problems that are inherent to representative political processes. The government's singular ability to diffuse injuries through weighted voting has yet to be acknowledged.[158] The *Warth* scheme remains in need of a compelling judicial rationale for its treatment of constitutional diffuse claims.

The solution to *Warth* requires constitutional lawmaking that provides for large groups injured in an undifferentiated way. Recognition that each member of society shares a claim to procedurally and equitably just treat-

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157. *See supra* note 127.

158. *See* City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1667 n.7 (1983) (illustrating the *Lyons* Court's failure to appreciate the unique capacity of government to diffuse injury). The *Lyons* Court stated that Lyons must "demonstrate that he, himself, will not only again be stopped by the police, but will be choked without any provocation or legal excuse." *Id.* at 1667.

159. Only if the minority feels more intensely about an issue than the majority are anti-majoritarian solutions likely to emerge from the legislature. If the majority is equal or more intense in its preferences, however, the will of the majority must prevail. It is only when minority preferences are intense enough to make the minority willing to sacrifice enough votes on other issues to detach majority voters, that the outcome might be changed through political logrolling activities. Even so, the danger exists that the minority logrolling may be offset by logrolling counteroffers urged by the majority. *See* J. BUCHANAN & G. TULLOCK, CALCULUS OF CONSENT 133 (1962).

Beyond this, the intensity factor has still other, perhaps more damaging implications for the minority interest. As Jaffe has noted, the bureaucracy is also aware of the intensity factor inherent in the transient political alliances which produced their legislative instructions. The tenous nature of that coalition means that minorities cannot realistically expect bureaucratic officials to be deterred from following their own political and professional interest. *See* Jaffe, *Standing to Secure Judicial Review, supra* note 45, at 1287.

ment, simply because each is a member of society, is required. While constitutional provisions reflect the relative power within the lawmaking process, they do not necessarily measure the stake or intensity of the claimant's interests.[159] At least some proponents of constitutional diffuse standing, such as social minorities who have historically been discriminated against, can be expected to provide the sharply focused advocacy traditionally required because they are seeking to vindicate real injuries to their dignitary interest.

Accordingly, the prudential tenets of the *Warth* scheme and its underlying policy theory require adjusting. The issue is properly viewed as a question of moral obligation: Whether a judicial forum ought to be available to any claimant within a diffusely injured group, when otherwise the right to the benefits of legal processes will be allocated by an approach that strips the litigant of dignity. The injustice of denying members of society equal status is trivialized by weighing it against considerations of judicial management. When the judiciary refuses to afford relief in instances where rights are being reallocated *sub silentio,* the consequence is the same as if these rights had not existed at all.

The need is not for radical departures from the prudentialist model; rather, it is for increased judicial sensitivity to the lawmaking process and the interests at stake. The extension of protections does not require new analytical tools; the Court need only determine whether the government's treatment of the constitutional diffuse claimant is peculiarly susceptible to invidious reasoning. If so, the Court should not give greater weight to its concerns with political retaliation, comity, and judicial administration than to a plaintiff's demands to vindicate his or her status in society. Diffuse standing must be broadened beyond the associational standing category and include a wider group of generalized claimants than merely taxpayers. The focus must be on the protection of the underlying dignitary relationships upon which society is predicated rather than the division of political power.

This reformulation directly responds to the moral issues raised in determining whether a plaintiff ought to be allowed standing to sue under article III. The prudential policy model of *Warth,* which proposes that standing is primarily a function of the Court's view of the appropriateness of the injury, should be rejected. The would-be litigants' loss of dignity must be accorded equal weight. The *Warth* notion that a litigant can lack standing to sue because the legislative branch is better suited to decide the dispute should also be refined. It is critical that there be an expanded concept of injury-in-fact to incorporate dignity protections for groups judicially recognized as being vulnerable to invidious discrimination. The Court should focus on the political transaction giving rise to the right and ask if the litigant claiming injury-in-fact failed to benefit from the political bargain as a result of potentially weighted voting. When the invidious effects of weighted voting are likely to be present, a plaintiff should be dismissed for lack of standing only if the right to vindicate the claimed injury has been explicitly precluded[160]

160. Explicit exclusion of a constitutional claim could arise only by constitutional amend-

or if the Court determines that it would be unreasonable to conclude that the plaintiff was the intended beneficiary of the right. Only in the light of these considerations should the courts address the prudential policy model concerns and decide whether to defer the claim to the legislature.

B. PRUDENTIALISM IN PERSPECTIVE

Despite the Court's hope that *Warth v. Seldin* would arrest the drive towards an expanded view of standing set in motion by *Flast,* the results suggest that today's standing doctrine is primarily a reflection of whether a majority of justices sit on the prudential or minimalist wing of the Court. The dominant theory of judicial prudentialism, with its desire for litigation focused on meaningful disputes, is not without some rational justification. It is the product of a decades-old debate to determine the proper role of courts in a democracy composed of co-equal, but separate branches of government. A fundamental concern has been that courts should not become engaged in resolving abstract and politically contentious matters which are better left to Congress or to private political bargaining. The Court utilizes this restraint as a means of advancing notions which are fundamental to the democratic process.

Consideration of other concerns related to judicial dispute resolution, however, reveals that prudentialism fails even on its own terms. To refer many disputants to the legislative arena can be the antithesis of a democratic resolution and can result in frustrating claimants by the very lack of political power that led them to the courts. Given the present approach to standing, the claims of the politically weak seeking to affirm constitutional protections are peculiarly vulnerable. If the supposed gains in clarity and the insulation of the courts from political disputes had been achieved, the cost arguably may have been warranted. But this is not the case. The problems inherent in predicating the right to sue on the Court's assessment of whether the right kind of injury has been suffered remain. The likelihood that issues will be well focused and rigorously pursued remains more logically related to the willingness of the party to undertake the burdens of suing rather than to any other factor. Looking beyond a threshold determination of whether the plaintiff has suffered an injury at the hands of defendant has invited opportunities for confusion and inequity. The decision to exclude particular kinds of claims often results in the Court making the very kind of political determination it seeks to avoid.

Thus, the problem is one of harmonizing judicial needs and defending interests framed as broad protections for society. The Court has been unable to develop an approach to standing which is sensitive to the political nuances of the entire law-creating process. This sensitivity is needed because groups that require the most judicial protection are often those least capable of

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ment, but as regards statutory claims the legislature is generally empowered to impose whatever constitutionally appropriate limits it wishes.

protecting themselves politically. Consequently, resort to the legislative arena is of little utility to these groups.

Accordingly, the proper method of addressing these problems, while recognizing the need for minimal judicial interference with other branches of government, is to recast the Court's standing doctrine. In the limited context of the constitutional diffuse plaintiff who claims invidious discrimination, prudential limitations should be abandoned. The Court should recognize that even those plaintiffs asserting the most generalized type of claims have a greater interest in being allowed to litigate their claims than the Court has in preventing these suits. It will not suffice for courts to subordinate constitutional claims and impose stringent notions of sufficient injury to prevent would-be litigants from suing. Given the present doctrine, the number of those frustrated can only continue to grow. The lesson is that the true mission of standing cannot, in justice, be to ease sitting.